

UNITED STATES DISTRICT COURT**DISTRICT OF NEVADA**

3 JAMES EARL HILL,

Case No. 2:98-cv-00914-KJD-DJA

4 v. Petitioner,

ORDER5
6 CALVIN JOHNSON, et al.,

7 Respondents.

I. INTRODUCTION

Petitioner James Earl Hill, a Nevada prisoner, has filed a counseled second-amended petition for a writ of habeas corpus under 28 U.S.C. § 2254. (ECF No. 135.) Respondents moved to dismiss Hill's second-amended petition, arguing that it contains claims that are not cognizable, are unexhausted, and/or are procedurally barred. (ECF No. 150.) On August 7, 2023, this Court granted the motion, in part, finding that (1) grounds 1, 2, and the ineffective-assistance-of-trial-counsel ("IATC") claims contained within grounds 4-12 and 14-17 were procedurally defaulted, deferring consideration of whether Hill could demonstrate cause and prejudice under *Martinez v. Ryan* to overcome the procedural default of these grounds until after the filing of an answer and reply in this action, (2) the substantive claims and ineffective-assistance-of-appellate-counsel ("IAAC") claims in grounds 3-11 and 14-17 were procedurally defaulted, and (3) the substantive claims and IAAC claims in grounds 12-13 were procedurally defaulted and/or non-cognizable. (ECF No. 168.) On September 7, 2023, Hill moved for reconsideration of this Court's order on the motion to dismiss. (ECF No. 169.) Respondents filed their response on November 1, 2023, and Hill replied on November 8, 2023. (ECF Nos. 172, 174.) For the reasons discussed below, the Court denies the motion for reconsideration.

1 **II. DISCUSSION**

2 In his motion for reconsideration, contrary to this Court’s previous order, Hill argues that
 3 grounds 1(a), 1(d), and 1(e) are fully exhausted. (ECF No. 169.) Because this Court has jurisdiction
 4 over this case, it can reconsider its interlocutory order on the motion to dismiss for sufficient cause.

5 *See City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001); *Smith v.*
 6 *Clark Cty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013); Local Rule (LR) 59-1 (“The court
 7 possesses the inherent power to reconsider an interlocutory order for cause, so long as the court
 8 retrains jurisdiction.”). This Court will now determine whether there is sufficient cause to
 9 reconsider its previous exhaustion rulings on grounds 1(a), 1(d), and 1(e).

10 **A. Ground 1(a)**

11 In ground 1(a), Hill alleges that his trial counsel failed to prepare for his trial and investigate
 12 his innocence, including investigating the following witnesses: Mary Golden, Chester Smith, and
 13 Clarence Cross. (ECF No. 135 at 16–23.) Respondents previously argued that in his state habeas
 14 petition, Hill referenced all three individuals—Golden, Smith, and Cross—but in his state habeas
 15 appeal he only referenced Golden. (ECF No. 150 at 7.) Hill rebutted that ground 1(a) is exhausted
 16 because “[t]he relevant declarations and petition, containing allegations and references on specific
 17 individuals, was filed with the Nevada Supreme Court as part of the record on appeal.” (ECF No.
 18 154 at 15.) This Court found that although Hill included his state petition for post-conviction relief
 19 in his appendix for his state habeas appeal filed with the Nevada Supreme Court, this inclusion
 20 was insufficient for exhaustion purposes. (ECF No. 168 at 12–13 (citing *Castillo v. McFadden*,
 21 399 F.3d 993, 1000 (9th Cir. 2005) (exhaustion requires presentation of federal constitutional issues
 22 before the highest available state court “within the four corners of his appellate briefing”)).) This
 23 Court then found that because only Golden and Cross were mentioned within the four corners of

1 Hill's opening brief to the Nevada Supreme Court, ground 1(a) was unexhausted to the extent it
 2 incorporated Smith. (*Id.* at 13.)

3 Hill asserts that this Court's exhaustion analysis on ground 1(a) was incorrect for two
 4 reasons: (1) he was only required to exhaust the federal, constitutional claim, not the individual
 5 facts within the claim, and the inclusion of additional facts in federal court does not render ground
 6 1(a) unexhausted, and (2) by including the declaration in the appendix to his brief on appeal in
 7 state court, Hill properly presented the facts to the Nevada Supreme Court. (ECF No. 169 at 4.)

8 Regarding Hill's former assertion, this Court does not interpret ground 1(a) as broadly as
 9 Hill. Hill articulates ground 1(a) as a claim of trial counsel ineffectiveness surrounding the failure
 10 to investigate, and he is merely using Golden, Smith, and Cross as bases for factual support for the
 11 claim. This Court construes ground 1(a) more narrowly: Hill's trial counsel's failure to investigate
 12 Golden, Smith, and Cross. As such, rather than Smith being a supportive fact within ground 1(a),
 13 this Court finds that Smith is foundational to ground 1(a). In other words, Golden, Smith, and
 14 Cross are the bedrock facts of ground 1(a) because without them ground 1(a) would be entirely
 15 lacking in substance. Accordingly, this Court reaffirms that ground 1(a) is unexhausted to the
 16 extent it incorporates Smith because Smith was not included within Hill's opening brief to the
 17 Nevada Supreme Court.

18 Turning to Hill's latter assertion, Hill contends that the Ninth Circuit has considered and
 19 confirmed proper presentation by way of the "appendix rule" under Nevada's state appellate
 20 procedural rules. (ECF No. 169 at 6.) In support of this contention, Hill cites *Emanuel v. Neven*,
 21 No. 21-15498, 2022 WL 2915595, at *4–8 (9th Cir. July 25, 2022). (*Id.*) Not only is *Emanuel* an
 22 unpublished, panel case, but Hill cites to the concurring opinion in *Emanuel*. Hill also supports
 23 this assertion by citing *Insyxiengmay v. Morgan*, *Scott v. Schriro*, *Greenway v. Schriro*, and

1 *Gallegos v. Ryan.* (ECF No. 169 at 6–7.) However, this Court has already determined that “Hill’s
2 reliance on [these cases] is unavailing because the exhaustion analysis in these cases was tied to
3 the relevant state procedures governing post-conviction review.” (ECF No. 168 at 13.) Finally,
4 Hill contends that the issue of whether including claims in an appendix satisfies the fair
5 presentation requirement in an issue of federal law, not state law. (ECF No. 169 at 7 (citing *Scott*
6 *v. Schriro*, 567 F.3d 573, (9th Cir. 2009) (“The only issue the state contests is whether including
7 the claims in an appendix in a petition for review to the Arizona Supreme Court satisfied the fair
8 presentation requirement for purposes of exhaustion. This is an issue of federal law, not state
9 law.”)).) This Court does not interpret this statement in *Scott* as saying that the so-called “appendix
10 rule” utilized in *Scott* dictates regardless of applicable state incorporation by reference rules;
11 rather, this Court interprets this statement in *Scott* as merely reiterating that fair presentation is an
12 issue of federal law. Consequently, because incorporation by reference is a procedurally incorrect
13 manner to present issues to the Nevada appellate courts, this Court reaffirms that the inclusion of
14 Smith within Hill’s appendix does not render that portion of ground 1(a) exhausted.

15 **B. Ground 1(d)**

16 In ground 1(d), Hill alleges that his trial counsel failed to investigate, interview, and present
17 at trial the following witnesses who could have aided in his defense: Shirley Baker, Calvin Walker,
18 Tanzie Austin, Cosby Ann Bailey Ford, Virginia Denson, John Henry Bolton, Essie Walker,
19 Sidney Wildridge, Calvin Walker, James Edward Price, and James Ray Taylor. (ECF No. 135 at
20 29–34.) Respondents previously argued that Hill included Ford as a possible mitigating witness in
21 his state habeas petition, but he did not include her in his claim regarding witnesses for the guilt
22 phase of the trial. (ECF No. 150 at 8.) Hill rebutted that the inclusion of Ford did not fundamentally
23 alter the claim presented to the state courts and that the other witnesses—besides Baker, Bailey,

1 and Price—were referenced in his state habeas petition, which, along with the declarations of these
2 witnesses, were included in his appendix to his state habeas appeal to the Nevada Supreme Court.
3 (ECF No. 154 at 15–16.) This Court found that ground 1(d) was only exhausted to the extent it
4 included the witnesses mentioned within the four corners of Hill’s opening brief to the Nevada
5 Supreme Court, and because only Baker and Price were mentioned, ground 1(d) was unexhausted
6 to the extent it incorporates witnesses other than Baker and Price. (ECF No. 168 at 13.)

7 As with ground 1(a), Hill asserts that this Court’s exhaustion analysis on ground 1(d) was
8 incorrect for two reasons: (1) he was only required to exhaust the federal, constitutional claim, not
9 the individual facts within the claim, and the inclusion of additional facts in federal court does not
10 render ground 1(d) unexhausted, and (2) by including the facts supporting this claim in the
11 appendix to his brief on appeal in state court, Hill properly presented the facts to the Nevada
12 Supreme Court. (ECF No. 169 at 8.) For the reasons discussed in ground 1(a), this Court finds that
13 these arguments lack merit. Indeed, the eleven witnesses discussed above make up the substance
14 of ground 1(d) and were not merely additional facts. And Hill fails to support his contention that
15 the so-called “appendix rule” applies in this case. Thus, this Court reaffirms that ground 1(d) is
16 unexhausted to the extent it incorporates witnesses other than Baker and Price.

17 C. Ground 1(e)

18 In ground 1(e), Hill alleges that his trial counsel failed to fully examine the physical
19 evidence, namely the inconsistencies between the physical crime scene and the testimony provided
20 by Leroy. (ECF No. 135 at 34.) Respondents previously argued that while Hill referenced this
21 claim in his state habeas petition, he did not include it in his appeal to the Nevada Supreme Court.
22 (ECF No. 150 at 8.) Hill rebutted that this claim was included in his state habeas petition, which
23 was included in his appendix to his state habeas appeal to the Nevada Supreme Court. (ECF No.

1 154 at 16.) This Court found that because ground 1(e) was not discussed within the four corners
 2 of Hill's opening brief to the Nevada Supreme Court, it was unexhausted. (ECF No. 168 at 14.)

3 Hill argues that this Court's exhaustion analysis on ground 1(e) was incorrect because he
 4 included this claim in the appendix to his brief on appeal in state court. (ECF No. 169 at 9.) Hill
 5 then argues in his reply brief that Respondents waived any argument that ground 1(e) was not
 6 properly exhausted because Respondents failed to address this argument in their response to the
 7 motion for reconsideration. (ECF No. 174 at 8.) This Court rejects both arguments. Regarding
 8 Hill's latter contention, Respondents argued generally that "documents attached to the appendix
 9 on appeal . . . do not serve to exhaust claims under state law." (ECF No. 172 at 5.) Although
 10 Respondents did not discuss ground 1(e) specifically, they discussed the basis of Hill's exhaustion
 11 contention for ground 1(e). And regarding Hill's former contention, for the reasons discussed in
 12 ground 1(a), Hill fails to support his contention that the so-called "appendix rule" applies in this
 13 case. Thus, this Court reaffirms that ground 1(e) is unexhausted.¹

14 **III. CONCLUSION**

15 **IT IS THEREFORE ORDERED** that the motion for reconsideration (ECF No. 169) is
 16 denied. Respondents have up to and including 45 days from the date of this order to file their
 17 answer to the remaining grounds in the second-amended petition (ECF No. 135).

18 DATED: 01/31/2024



19
 20 KENT J. DAWSON
 21
 22 UNITED STATES DISTRICT COURT

23
 24 ¹Notably, this Court previously found that the anticipatory default doctrine applies, so it considered
 25 Hill's unexhausted claims, including grounds 1(a), 1(d), and 1(e), technically exhausted but
 procedurally defaulted. (ECF No. 168 at 17.) This Court then found that Hill has met three of the
 four elements under *Martinez* for overcoming the procedural default of these grounds and deferred
 consideration of the fourth element. (*Id.* at 19–20.)